

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

VINCENT CARTER,

Petitioner,

Case No. 04-CV-74564-DT
Honorable Denise Page Hood

v.

HUGH WOLFENBERGER,

Respondent.

**OPINION AND ORDER GRANTING RESPONDENT'S
MOTION FOR STAY PENDING APPEAL
AND
DENYING MOTION FOR IMMEDIATE RELEASE**

Petitioner, Vincent Carter, is a state inmate currently incarcerated at the St. Louis Correctional Facility in St. Louis, Michigan, pursuant to convictions for felony murder, armed robbery, and possession of a firearm during the commission of a felony. On November 27, 2006, this Court issued an opinion and order granting Petitioner a conditional writ of habeas corpus and ordered the State to release the Petitioner from custody unless he was retried within ninety days of the date of the order. Before the Court now is Respondent's motion to stay the order pending appeal.

Federal Rule of Appellate Procedure 23 (c) provides that, while a decision ordering the release of a prisoner is on appeal, "the prisoner must—unless the court or judge ordering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety." *Id.* The United States Supreme Court has held that this rule "undoubtedly creates a presumption of release from

custody in such cases. *Hilton v. Braunschweig*, 481 U.S. 770, 774 (1987). That presumption, however, may be overcome in the district court judge's discretion. *Id.* The United States Supreme Court in *Hilton* has held that a federal court should consider the following factors in deciding whether to stay an order granting habeas corpus relief pending appeal:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 776.

A federal district court may also consider “[t]he State’s interest in continuing custody and rehabilitation pending a final determination of the case on appeal . . . ; it will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served.” *Hilton, supra* at 777. In the pending case, Petitioner was sentenced to nonparolable life imprisonment for the felony murder conviction, and two years imprisonment for the felony-firearm conviction. The remaining portion of his sentence to be served is long.

With respect to the remaining *Hilton* factors, the Court notes, on one hand, that Petitioner may be injured by his continued confinement pursuant to a conviction this Court has found to be constitutionally infirm. On the other hand, it would be a waste of judicial resources for the appeal to proceed in the Sixth Circuit Court of Appeals, while simultaneously requiring the State to retry Petitioner.

Considering the factors enumerated in *Hilton*, the Court holds that a stay pending appeal is appropriate in this case.

Accordingly, IT IS ORDERED that Respondent’s motion for stay pending appeal is

GRANTED [Docket No. 35, filed December 21, 2006 and Docket No. 37, filed December 28, 2006] and this Court's Opinion and Order Granting Petitioner a Conditional Writ of Habeas Corpus is STAYED PENDING DISPOSITION OF THE APPEAL currently in the United States Court of Appeals for the Sixth Circuit. The Court grants the stay without prejudice to Petitioner's right to request reconsideration at a later date or to file a motion for bond pending appeal.

IT IS FURTHER ORDERED that, unless a new trial is scheduled within FORTY-FIVE (45) DAYS of the issuance of the mandate by the Sixth Circuit Court of Appeals favorable to Petitioner, Petitioner must be released.

IT IS ORDERED that Petitioner's Motion for Immediate Release [Docket No. 41, filed February 23, 2007] is DENIED.

s/ DENISE PAGE HOOD
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

DATED: February 28, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on February 28, 2007, by electronic and/or ordinary mail.

S/William F. Lewis
Case Manager